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RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

W.H.A.

9
10 IN THE UNITED STATES DISTRICT COURT
11
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA

WHA

13 JERRY ELSTER,

Petitioner,

14 vs.

15 ROBERT AYERS, JR.,

16 Warden of San Quentin
State Prison,
Respondent,

17 On Habeas Corpus.

) No. C ~~11-08~~ 3279
18)
19) NOTICE OF PETITION AND
20) PETITION FOR WRIT OF HABEAS
21) CORPUS BY A PERSON IN STATE
22) CUSTODY UNDER 28 U.S.C. § 2254
23)
24) [California Supreme Court
25) Case No. S162798]
26)
27) [California Court of Appeal
28) Case No. B206602]
29)
30) [Los Angeles County Superior Court
31) Case No. BH005025]
32)
33)

34 BOARD OF PAROLE

35 HEARINGS, ARNOLD

36 SCHWARZENEGGER,

37 Governor,
Real Parties In Interest.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JERRY ELSTER,)
Petitioner,) No. C _____
vs.)
ROBERT AYERS, JR.,)
Warden of San Quentin)
State Prison,)
Respondent,)
On Habeas Corpus.)

BOARD OF PAROLE)
HEARINGS, ARNOLD)
SCHWARZENEGGER,)
Governor,)
Real Parties In Interest.)

[California Supreme Court
Case No. S162798]
[California Court of Appeal
Case No. B206602]
[Los Angeles County Superior Court
Case No. BH005025]

)

TO: ROBERT AYERS, JR., WARDEN OF SAN QUENTIN STATE PRISON,
RESPONDENT; EDMUND G. BROWN, JR., ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA, COUNSEL FOR RESPONDENT; AND THE
CLERK OF THE ABOVE-ENTITLED COURT:

1 PLEASE TAKE NOTICE that prisoner Jerry Elster (hereinafter "Elster" or
2 "petitioner"), by and through his counsel, will and hereby does petition this Court,
3 pursuant to 28 U.S.C. § 2254, for a writ of habeas corpus.
4

5 **STATEMENT OF THE CASE**

6 Elster, California Department of Corrections prisoner number C-85977, is
7 presently in custody at San Quentin State Prison in Marin County, California. He is
8 confined pursuant to a judgment of the Los Angeles County Superior Court in case no.
9 A396298, rendered on April 18, 1984, following his conviction for violating California
10 Penal Code § 187, second-degree murder, with a sentencing enhancement for personal
11 use of a firearm pursuant to California Penal Code § 12022.5. His sentence is 17 years to
12 life.
13

14 By operation of law, Elster became eligible for parole on June 8, 1995. The
15 California Board of Prison Terms, later renamed the California Board of Parole Hearings
16 (hereafter "Board"), denied him parole on six occasions between 1994 and 2003.
17

18 On September 13, 2005, at his seventh hearing, a Board panel found Elster
19 suitable for release. The panel's decision was adopted by the Board, subject to the
20 Governor's power of review. On January 30, 2006, Governor Arnold Schwarzenegger
21 (hereafter "Governor") reversed the Board's decision to release Elster on parole.
22

23 At Elster's eighth hearing, on September 6, 2006, a second panel found him
24 suitable for release. Once again, the panel's decision was adopted by the Board, subject
25 only to the Governor's power of review. On January 31, 2007, the Governor once again
26 reversed the Board's decision to release Elster on parole.
27
28

1 On September 19, 2007, at Elster's ninth parole hearing, following two years'
2 consecutive findings of suitability, and with no negative changes in his record, the Board
3 deemed Elster *unsuitable* for release and deferred his parole consideration for another
4 year.

5 All three of the latest decisions to deny Elster parole—the Governor's January
6 2006 and January 2007 decisions, and the Board's September 2007 decision—are at issue
7 herein. Elster claims that by September 2005 at the latest, there was no evidence in the
8 record to rationally suggest that his release would pose an unreasonable danger to society,
9 the standard that the Governor and the Board were required to apply. Over the last three
10 years, he contends, his constitutionally-protected liberty interest in parole has been
11 arbitrarily and capriciously denied on three separate occasions.

12 Elster was represented at his September 2005, September 2006 and September
13 2007 parole hearings and throughout his state collateral proceedings by the Law Office of
14 Scott Handleman, 115 ½ Bartlett Street, San Francisco, California.

15 Elster is presently serving a sentence of 17 years to life for the commitment
16 offense. Pursuant to a judgment of the San Joaquin County Superior Court in case no.
17 37890, rendered on March 5, 1986, Elster has a consecutive 16 month sentence for a
18 single violation of Penal Code § 12020, possession of a concealed weapon, received
19 during his second year of incarceration.

20 Elster has no other petition or appeal now pending in any court, either state or
21 federal, as to the three parole denials under attack herein. He asserts that all issues raised
22 in this petition have been raised before state tribunals to the exhaustion of his state
23

1 remedies, and he has not previously sought relief arising out of these three parole denials
2 from this Court or any other federal court.

3 **EXHAUSTION OF STATE REMEDIES**

4
5 Elster litigated his claims relating to the parole denials under attack through two
6 parallel sets of collateral proceedings in the California state courts.

7 **Exhaustion of State Remedies as to Claim # 1 and Claim # 2***

8
9 On December 17, 2007, Elster filed a petition for writ of habeas corpus in the Los
10 Angeles County Superior Court in case no. BH005025. Elster claimed that the
11 Governor's January 2007 denial of parole and the Board's September 2007 denial of
12 parole were arbitrary and capricious, in violation of due process, because they were
13 entirely lacking in evidentiary support and rational connection between findings and
14 conclusions.

15
16 On February 19, 2008, the Los Angeles Superior Court, without a hearing, denied
17 the petition with a reasoned decision.

18
19 On March 21, 2008, Elster filed a habeas petition in the California Court of
20 Appeal, Second Appellate District, in case no. B206602, raising the identical claims that
21 he had raised in the superior court. On April 10, 2008, that court, without a hearing,
22 denied the petition without comment.

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26 * Claim #1 and Claim #2 are Elster's due process claims as to the Governor's January 2007
27 parole denial and the Board's September 2007 parole denial, respectively. Claim #3 is Elster's
28 due process claim with respect to the Governor's January 2006 denial of parole. Claim #3
replicates the argument of Claim #1 with respect to arbitrary reliance on immutable factors, with
the additional sub-claim that the Governor exceeded the scope of his authority when exercising
his power of review.

1 On April 18, 2008, Elster filed a petition for review to exhaust state remedies in
2 the California Supreme Court, in case no. S162798, in which he again raised the federal
3 claims raised in the lower courts. Elster's petition for review set forth his federal claims
4 as follows:

5 (1) Mandatory language in a parole statute, such as the language of Penal Code
6 section 3041, gives rise to a liberty interest in parole which is protected by the due
7 process clause of the Fourteenth Amendment to the United States Constitution.

8 *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex* 442 U.S. 1, 12,
9 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); U.S. Constitution, Amendment 14, § 1. On
10 January 31, 2007, by finding Elster to pose a danger to society, in the face of a record
11 that unmistakably showed him to be a rehabilitated individual who posed no threat to
12 society, the Governor rendered a decision that lacked even a modicum of evidentiary
13 support and was arbitrary and capricious. As such, he violated the Fourteenth
14 Amendment's due process guarantee that Elster's parole determination must be supported
15 by "some evidence." *Superintendent v. Hill*, 472 U.S. 445, 456, 105 S.Ct. 2768, 86
16 L.Ed.2d 356 (1985).

17 (2) On September 19, 2007, by finding Elster to pose a danger to society, in the
18 face of a record that unmistakably showed him to be a rehabilitated individual who
19 posed no threat to society, the Board of Parole Hearings rendered a decision that lacked
20 even a modicum of evidentiary support and was arbitrary and capricious. As such, the
21 Board violated the Fourteenth Amendment's due process guarantee that Elster's parole
22

1 determination must be supported by "some evidence." *Hill, supra*, 472 U.S. at 456;
2 *Greenholtz, supra*, 442 U.S. at 12; U.S. Constitution, Amendment 14, § 1.

3 On June 18, 2008, the California Supreme Court, without a hearing, denied the
4 petition for review without comment.

5 **Exhaustion of State Remedies as to Claim # 3**

6 On March 28, 2006, Elster filed a petition for writ of habeas corpus in the Los
7 Angeles County Superior Court in case no. BH003937. Elster claimed that the
8 Governor's January 30, 2006 reversal of his parole date on the basis of immutable factors
9 in the absence of current evidence of dangerousness was arbitrary and capricious, in
10 violation of the federal and state due process clauses. On January 31, 2007, the superior
11 court issued an order to show cause. The state filed a response and petitioner filed a
12 traverse. On July 23, 2007, the superior court denied the petition with a reasoned
13 opinion.

14 On October 2, 2007, Elster filed a petition for writ of habeas corpus in the
15 California Court of Appeal, Second Appellate District, Division Three, raising the same
16 claims. The petition was denied, with a reasoned opinion addressing Elster's federal due
17 process claim on the merits, on December 5, 2007.

18 On December 14, 2007, Elster filed a petition for review to the California
19 Supreme Court, seeking review of the Court of Appeal's decision. Elster directly
20 challenged that portion of the Court of Appeal's decision which addressed Elster's
21 federal due process claim. The petition for review was denied without comment on
22 February 20, 2008.

STATEMENT OF FACTS

Petitioner has prepared a detailed statement of facts in the accompanying Memorandum of Points and Authorities, and the same is incorporated herein by reference as though set forth in full. That statement narrates the circumstances of the commitment offense, provides a detailed chronology of Elster's substantial accomplishments while incarcerated, his public service efforts in prison, his educational and vocational achievements, completion of numerous self-help programs, and his feat in avoiding disciplinary rules violations for over 19 years as of this date. In addition, the statement of facts excerpts relevant portions of Elster's last three parole hearings and both of the Governor's reversals. The court's attention is directed to the attached Points and Authorities for a full understanding of the background of this matter.

CLAIMS

By the instant petition, Elster states the following grounds on which he claims he is being held unlawfully:

Claim No. 1

Elster's rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution were violated in January 2007 when the Governor determined that he was unsuitable for parole, for the second year in a row, in the absence

1 of evidentiary support in the record and rational connection between his findings and
2 conclusions. This claim is based on the following:¹

3 1. No record evidence supported a conclusion that Elster presented an
4 unreasonable danger to society or that “consideration of the public safety require[d] a
5 more lengthy period of incarceration”, the regulatory and statutory standard that the
6 Governor was obligated to apply in reviewing Elster’s parole suitability. Cal. Penal Code
7 § 3041(b); accord Cal. Code Regs., tit. 15, § 2402(a). The record was replete with
8 evidence, summarized below, that overwhelmingly and without contradiction supported
9 the Board’s finding that public safety required no further incarceration of Elster.

10 2. The panel granting parole in September 2006 found Elster to have eight of the
11 nine factors favoring parole suitability set forth in California Code of Regulations, title
12 15, section 2402(d)—every one but battered women’s syndrome. The Governor disputed
13 only one of them.

14 3. At the time of his second parole grant, Elster had been incarcerated for nearly
15 23 years, including over 22 years in state prison, during which time he had become a
16 model prisoner. Remarkably, he had not received a serious disciplinary citation in more
17 than 17 years, and had not even committed a minor rules infraction in over 15 years.

18 4. Elster had a history of favorable mental health evaluations that militated in
19 favor of release. As far back as 1999, a CDC-contracted psychologist stated that Elster

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27 ¹ As with all of Elster’s claims, record citations and fuller discussions of the facts and law are
28 submitted herewith in the corresponding sections of his memorandum of points and authorities
and are supported by the accompanying exhibits. The memorandum and exhibits are
incorporated by reference herein.

1 "would not present a potential for violence" and indeed would be likely to "flourish in
2 society." In 2000, a CDC staff psychologist recommended him for parole. In 2005, a
3 third CDC-contracted psychologist wrote that "there would seem to be no further purpose
4 served by [Elster's] continued incarceration."

5 5. During the early years of his incarceration, Elster had distanced himself from
6 gangs. Over the course of his incarceration, he emerged as a leader in violence
7 prevention programs. Elster co-founded and co-facilitated No More Tears, a workshop
8 series for prisoners preparing for community re-entry. He mentored at-risk juveniles
9 through the Squires program. These activities earned Elster the parole recommendations
10 of community leaders, law enforcement officers, and gang prevention workers.

11 6. The record further established that Elster had emerged as an acknowledged
12 peacemaker among inmates within the prison system. As an example, Correctional
13 Lieutenant Vernell Crittendon wrote that "following a series of violent incidences at San
14 Quentin, [Elster] worked among the inmates calling for restraint instead of retaliation.
15 For an inmate to take on the role of 'peacemaker' puts him at great risk of physical harm
16 and ostracization." All told, at least five correctional officers, in addition to two police
17 officers who knew Elster through the juvenile mentorship program, wrote to the Board in
18 2006 to state that society would *affirmatively benefit* from Elster's release.

19 7. Elster, who entered prison as a nominal high-school graduate with a seventh-
20 grade education (as measured by test scores) had earned a GED in prison and two
21 associates' degrees, and planned to earn a B.A. upon release.
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1 8. Elster had obtained two vocational certifications, earned excellent work reports,
2 and participated in a litany of self-help, group therapy and spiritual programs.
3

4 9. Elster had neither a juvenile nor an adult record for crimes of violence prior to
5 his commission of the conviction offense. He had no history of mental illness, drug or
6 alcohol problems.
7

8 10. Elster was sincerely remorseful for his participation in the commitment
9 offense, and the panel so found.
10

11 11. Elster had a stable social history, and the panel so found. He had maintained
12 contact with his mother, step-father, and siblings in Los Angeles, and forty support letters
13 reflected his breadth and depth of support in Los Angeles and the San Francisco Bay
14 Area.
15

16 12. Elster had realistic parole plans, and the panel so found. He planned to live
17 with his wife, Miki Ross-Elster, a licensed Marriage and Family Therapist and youth
18 counselor at Alameda County juvenile hall, who visited him in prison twice a week. He
19 had a firm and realistic job offer with a defense investigative agency, multiple back-up
20 employment plans, and a path towards an eventual career in youth counseling.
21

22 13. The panel found that Elster's prison file reflected "a long process of change
23 that started in the early nineties and has continued with increasing frequency, depth and
24 dedication, until today's date." It found that "maturation, growth, greater understanding
25 and advanced age" had reduced Elster's probability of recidivism.
26

27 14. Applying the sentencing matrix of California Code of Regulations, Title 15, §
28 2403(c), the Board fixed Elster's base term for second degree murder at 19 years. With

1 enhancements and good time credits, his total adjusted period of confinement came to 14
2 years and 9 months. Yet, when the Governor reversed Elster's parole date on the basis of
3 the commitment offense, Elster had served almost 23 years in state prison.
4

5 15. The Governor's justifications for his decision had no rational connection to
6 the evidence and to the conclusions drawn therefrom. In particular, the Governor
7 justified his decision exclusively on the basis of stale, immutable factors that no longer
8 amounted to reliable evidence of Elster's present-day dangerousness.
9

10 16. The Governor's primary justification for his determination that Elster was
11 unsuitable for parole in 2007 was that the commitment offense was especially grave. But
12 the manner in which the commitment offense was perpetrated by the 20-year-old Elster
13 could not rationally support a finding of present dangerousness after more than 23 years,
14 in light of the uncontested record evidence of the 43-year-old Elster's enormous
15 growth and maturation since that earlier time. This conclusion is dictated by the "some
16 evidence" standard of *Hill, supra*, 472 U.S. 445, and by the Ninth Circuit Court of
17 Appeals' holdings in *Irons v. Carey*, 505 F.3d 846 (9th Cir. 2007), and *Biggs v. Terhune*,
18 334 F.3d 910 (9th Cir. 2003) that, after a sufficient intervening period of good conduct, a
19 prisoner's commitment offense and other immutable factors eventually cease to constitute
20 "some evidence" of whether the prisoner's release would pose a danger to society.
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23 17. The Governor found that the commitment offense had been perpetrated with
24 "exceptionally callous disregard for human suffering and life", for an "extremely trivial"
25 motive, and was, therefore, "especially heinous." The record, however, revealed that the
26 fatal conflict arose out of a sudden argument, that the victim reached menacingly under
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1 his shirt and chased Elster around two parked cars before Elster got a gun, that the victim
2 was armed with a knife and high on PCP. Given the victim's contributory role and the
3 sudden unfolding of events, there was nothing about the crime to qualify it as "especially
4 heinous" when compared to other murders in the second degree.

6 18. In 1984, the probation officer found a mitigating factor in that "the victim was
7 an initiator, willing participant, aggressor or provoker of the incident." At the 2006
8 hearing, a deputy district attorney agreed that "[t]he victim was an active participant in
9 the crime and certainly the peer pressure contributed to this." Peer pressure is a factor in
10 mitigation under California Code of Regulations, Title 15, § 2405(a)(3). Under the
11 comparative analysis mandated by state regulations and the "some evidence" standard,
12 there was no evidence that Elster's crime was aggravated relative to other second-degree
13 murders in any way that the Governor could have lawfully relied upon to establish
14 Elster's present dangerousness.

18 19. In order to rely on Elster's commitment offense to deny parole, the Governor
20 was required by state law to identify circumstances making it particularly egregious
21 relative to other second-degree murders. *In re Dannenberg*, 34 Cal.4th 1061, 1094-95, 23
22 Cal.Rptr.3d 417, 104 P.3d 783 (2005). As proof of the special egregiousness of Elster's
23 crime, the Governor relied upon the sub-finding that Elster could have safely walked
24 away from his retreating victim. There is no rational connection between that finding and
25 the conclusion that Elster's crime was "especially heinous" relative to other second-
26 degree murders, because *every single murder* necessarily involves a perpetrator who is
27 not legitimately engaged in self-defense or defense of others at the moment of the crime.

1 Nor is that circumstance evidence that Elster continued to pose a danger in the year 2007
2 because, as the uncontroverted evidence established, he had matured considerably since
3 1983.
4

5 20. To establish the murder's especial heinousness, the Governor further found
6 that Elster had endangered bystanders by firing the gun when other people were around.
7 The Governor's reliance on this circumstance was arbitrary because (1) in the heat of the
8 moment, disregard of the purely speculative possibility of a wounded bystander pales by
9 comparison to the *mens rea* involved in directly shooting another human being, such that
10 the disregard of this corollary danger cannot rationally aggravate the gravity of Elster's
11 crime, and (2) beyond the circumstance that there were other persons in the general
12 vicinity, there was not a shred of evidence that Elster displayed a reckless disregard as to
13 any bystander's fate. Nor is the presence of bystanders at the crime scene rational
14 evidence of Elster's unsuitability for parole more than 23 years later.
15

16 21. As a further example of an arbitrary finding, the Governor stated that "[t]he
17 record contains some evidence that Mr. Elster has maintained gang ties while in prison."
18 On information and belief, based on the Governor's revelations in the prior year's
19 reversal of Elster's parole, the last of the confidential gang memoranda was generated in
20 1990—17 years before the 2007 reversal. For the Governor to describe a 17-year
21 absence of gang allegations as evidence that Elster "has maintained" gang ties was a
22 plainly arbitrary misstatement of the record.
23

24 22. Although he did not specify them as bases for reversing parole, the Governor
25 recited miscellaneous facts as to Elster's very early prison misconduct, non-violent arrest
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1 history, and alleged history of street gang involvement. However, none of these decades-
2 old facts rationally supported a finding of present dangerousness, in light of the
3 uncontested record evidence of Elster's subsequent record of self-improvement, public
4 service, and longstanding fealty to the law.

6 23. Because of the absence of some evidence in the record to support the
7 Governor's January 2007 finding that Elster was unsuitable for parole under the pertinent
8 standard, and because of the absence of any rational connection between the record
9 evidence and the Governor's findings and conclusions, the California Supreme Court
10 decision upholding the Governor's determination failed to apply or unreasonably applied
11 clearly-established federal law as determined in *Greenholtz v. Inmates of Nebraska*
12 *Penal*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979), which held that a parole
13 scheme containing mandatory language, such as that of California, gives rise to a
14 cognizable liberty interest in parole, and *Superintendent v. Hill*, 472 U.S. 445, 105 S.Ct.
15 2768, 86 L.Ed.2d 356 (1985), which held that due process is only satisfied if some
16 evidence, containing sufficient indicia of reliability, supports a governmental decision
17 resulting in the loss of an important liberty interest. Consequently, the California
18 Supreme Court decision upholding the Governor's reversal was contrary to and/or an
19 unreasonable application of clearly established Federal law, meeting the gateway tests of
20 28 U.S.C. § 2254(d)(1). In addition, the California Supreme Court decision was based on
21 an unreasonable determination of the facts, meeting the gateway test of § 2254(d)(2).

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Claim No. 2

Elster's rights to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution were independently violated in September 2007 when a Board panel determined that he was unsuitable for parole in the absence of evidentiary support in the record and rational connection between findings and conclusions. This claim is based on the following:

1. No evidence supported a conclusion that Elster “will pose an unreasonable risk of danger to society if released from prison,” the pertinent regulatory standard for granting parole that the Board was obligated to apply. The record evidence once again proved, without contradiction, that public safety required no further incarceration of Elster.

2. The evidence of Elster's suitability had only mounted since 2006, when the prior Board panel had found him suitable for release. He had remained discipline-free for 18 ½ years, without even committing a minor infraction of CDC rules in over 16 years. He had continued a robust diet of self-help and therapy programs and violence prevention activities. He had continued to receive excellent work reports.

3. In the year since his last hearing, Elster had initiated and organized an institution-approved event to promote prisoner coexistence, called the San Quentin Day of Peace. The record showed that Associate Warden J. C. Allen, writing "on behalf of San Quentin's administration", thanked Elster for his role in keeping San Quentin peaceful.

1 4. Elster's parole plans were current, with a fresh batch of 30 support letters
2 documenting his prospective home, family, job offer, back-up employment plans, and
3 community support network.
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5 5. The Board panel's justifications for its decision had no rational connection to
6 the evidence and to the conclusions drawn therefrom.
7

8 6. The Board's first justification for its determination that Elster was unsuitable for
9 parole in 2007 was that the commitment offense had been perpetrated in 1983 "in an
10 especially cruel and callous manner", on behalf of a motive that was "very trivial in
11 relation to the offense." However, in light of a finding of the Santa Clara County
12 Superior Court that "in one hundred percent of 2,690 randomly chosen cases, the Board
13 found the commitment offense to be 'especially heinous, atrocious or cruel', a factor
14 tending to show unsuitability under Title 15 § 2402(c)(1)", the Board's findings as to the
15 especial heinousness of Elster's offense were nothing more than meaningless boilerplate.
16

17 *In re Criscione* (Santa Clara Super. Ct. No. 71614 (Aug. 30, 2007)), *app. pending* (Cal.
18 Ct. App., Sixth App. Dist., No. H032048).
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20 7. The panel did not specify facts with regards to Elster's crime that justified
21 continued denial of parole. As was true of the Governor's reversal seven months earlier,
22 the manner in which the commitment offense was perpetrated by the 20-year-old Elster
23 could not rationally support a finding of present dangerousness almost 24 years later, in
24 light of the uncontroverted record evidence of Elster's tremendous growth and
25 maturation.
26

1 8. Aside from a spurious allegation as to Elster's parole plans, all of the
2 circumstances relied on by the Board to deny parole were at least 17 years old at the time
3 of denying parole (except for one minor rules infraction 16 years prior). The panel's
4 heavy weighing of these stale and immutable factors, in disregard of their temporal
5 remoteness and the much more relevant 17 subsequent years of Elster's model conduct,
6 was arbitrary and capricious.
7
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9 9. The panel impermissibly ignored relevant evidence, in violation of due process,
10 by discounting the favorable 2005 psychological report on the baseless grounds that the
11 psychologist had given insufficient weight to Elster's gang association history. In fact,
12 the psychologist cited Elster's gang affiliation four times in her report, and specifically
13 recommended "abstinence from ... contact with gang members" in the event of Elster's
14 parole.
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16

17 10. The Board spuriously found that Elster's job offer was "vague" because it did
18 not set forth his salary and benefits—despite the fact that it came on letterhead, was
19 signed by the director of a reputable criminal investigations agency, promised full-time
20 employment, and had been approved by the Board (without quarrel by the Governor)
21 exactly one year before. The Board's derogation of Elster's employment plans was
22 arbitrary and capricious for four reasons: (1) given that the Board and Governor had
23 approved identical employment plans with the same agency the previous year, the Board
24 was imposing a novel evidentiary standard for parole consideration with no notice to
25 Elster; (2) the Board's novel specificity requirement grossly exceeded the standard set
26 forth in California Code of Regulations, title 15, § 2402(d)(8); (3) Elster presented the
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1 Board with multiple back-up options for work and job search assistance, which the Board
2 inexplicably disregarded; and (4) had the panel wished, they could have easily obtained
3 the desired information with a telephone call during their deliberative recess.
4

5 11. Because of the absence of some evidence in the record to support the Board's
6 September 2007 finding that Elster was unsuitable for parole under the pertinent
7 standard, and because of the absence of any rational connection between the record
8 evidence and the Board's findings and conclusions, the California Supreme Court
9 decision upholding the Board's parole determination failed to apply or unreasonably
10 applied the correct controlling authority of *Greenholtz, supra*, 442 U.S. 1 (1979), which
11 established that a parole scheme such as that of California gives rise to a cognizable
12 liberty interest in release on parole, and *Hill, supra*, 472 U.S. 445 (1985), which
13 established that due process is only satisfied if some evidence, containing sufficient
14 indicia of reliability, supports a governmental decision resulting in the loss of an
15 important liberty interest. The California Supreme Court decision was contrary to and/or
16 an unreasonable application of clearly established Federal law, meeting the gateway test
17 of 28 U.S.C. § 2254(d)(1), and was based on an unreasonable determination of the facts,
18 meeting the gateway test of § 2254(d)(2).

23 **Claim No. 3**
24

25 Elster's rights to due process of law under the Fifth and Fourteenth Amendments
26 to the United States Constitution were violated in January 2006 when the Governor
27 determined that he was unsuitable for parole in the absence of evidentiary support in the
28

1 record and rational connection between his findings and conclusions. This claim is based
2 on the following:

3 1. By January 2006, no evidence appeared in the record to support the conclusion
4 that Elster “will pose an unreasonable risk of danger to society if released from prison,”
5 the pertinent regulatory standard for granting parole that the Governor was obligated to
6 apply to him. The Governor reversed the 2005 Board’s finding of suitability strictly on
7 the basis of Elster’s commitment offense, which in 2006 was no longer rationally
8 probative of whether or not he was a danger to society, after 22 years of incarceration and
9 17 years’ good behavior.

10 2. The Governor violated due process by considering facts *outside of the*
11 *evidentiary record*, in blatant excess of his parole review authority, which is limited to a
12 review of “materials provided by the parole authority.” Cal. Penal Code § 3041.2.
13 Although the granting panel explicitly stated that its record did not include confidential
14 information, the Governor nevertheless cited confidential information—all of it 16 or
15 more years old—in his reversal of Elster’s parole date.

16 3. Because of the absence of some evidence in the record to support the
17 Governor’s January 2006 finding that Elster was unsuitable for parole under the pertinent
18 standard, because of the absence of any rational connection between the record evidence
19 and the Governor’s findings and conclusions, and because of the Governor’s unwarranted
20 review of facts outside the evidentiary record, the California Supreme Court decision
21 upholding the Board’s determination failed to apply or unreasonably applied the correct
22 controlling authority as established in the holdings of *Greenholtz, supra*, 442 U.S. 1

1 (1979), which established that a parole scheme such as that of California gives rise to a
2 cognizable liberty interest in release on parole, and *Hill, supra*, 472 U.S. 445 (1985),
3 which established that due process is only satisfied if some evidence, containing
4 sufficient indicia of reliability, supports a governmental decision resulting in the loss of
5 an important liberty interest. The California Supreme Court decision upholding the
6 Governor's January 2006 determination was contrary to and/or an unreasonable
7 application of clearly established federal law, meeting the gateway test of 28 U.S.C. §
8 2254(d)(1), and was based on an unreasonable determination of the facts, meeting the
9 gateway test of § 2254(d)(2).
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11

13 EXHIBITS

14 Petitioner has concurrently lodged an Appendix with this Court containing the
15 documents supporting this petition and the same are incorporated herein by reference as
16 though set forth in full.
17

18 PRAYER FOR RELIEF

19 WHEREFORE, Petitioner requests that this Court:
20

21 1. Issue a writ of habeas corpus or order to show cause to the respondent and the
22 real parties in interest to inquire into the legality of Petitioner's incarceration, and have
23 Elster brought before it to the end that he may be discharged from his unconstitutional
24 sentence;
25

26 2. Order that the decision of the Governor to reverse Elster's parole grant on
27 January 30, 2006 and/or the decision of the Governor to reverse Elster's parole grant on
28 January 31, 2007 and/or the decision of the Board panel to deny Elster's parole on

1 September 19, 2007 was unlawful, reinstate the September 13, 2005 and/or the
2 September 6, 2006 parole grant, and immediately release Petitioner, as Elster has already
3 been lawfully found suitable for parole on two occasions by the Board of Parole Hearings
4 and further review by the Governor or Board could not support a denial of parole;

5 3. Conduct an evidentiary hearing if necessary to resolve any disputed factual
6 issues, and after the hearing, issue an order directing the Board to act as set forth in
7 paragraph 2, above; and

8 4. Grant such additional relief as may be appropriate and dispose of the matter as
9 law and justice require.

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14 Dated: 7/8/08

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16 Respectfully submitted,
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SCOTT HANDLEMAN
Attorney for Petitioner,
JERRY ELSTER

VERIFICATION

I, SCOTT HANDLEMAN, declare as follows:

I am the attorney for Petitioner in the above-entitled matter, and my practice is located in San Francisco County. Petitioner Jerry Elster is currently in custody in Marin County. Additionally, I am personally familiar with the facts and circumstances underlying the present Petition. I am acting on behalf of Petitioner as his attorney, and am authorized to sign this Verification pursuant to 28 U.S.C. § 2242. I have read the foregoing Petition for Writ of Habeas Corpus and know the contents thereof. The same is true of my own personal knowledge, except as to those matters stated upon my information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 8, 2008, at San Francisco, California.

Scott Handelman
SCOTT HANDLEMAN

1
2 **PROOF OF SERVICE BY U. S. MAIL**
3

4 Case Name: *In re Jerry Elster*, on Habeas Corpus
5

6 Court: United States District Court, Northern District of California
7

8 Case No.: _____
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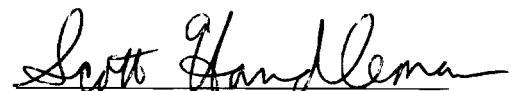
10 I, Scott Handleman, hereby certify that I am a resident of the County of San Francisco,
11 California. I am over the age of 18 and not a party to this matter. On this day,
12

13 7-8-08, I served true and correct copies of the foregoing NOTICE OF PETITION
14 AND PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY
15 UNDER 28 U.S.C. § 2254; VERIFICATION; PROOF OF SERVICE by mailing copies thereof
16 via U.S. first-class mail, postage prepaid, to:

17
18 Office of the Attorney General
19 Correctional Law Unit
20 110 West A Street, Suite 1100
21 San Diego, CA 92101
22

23 I declare under penalty of perjury that the foregoing is true and correct. Executed on
24

25 7-8-08 at San Francisco, California.
26

27
28 
29 Scott Handleman
30